

Cherwell District Council

Executive

2 October 2023

Building Control Enforcement

Report of Assistant Director - Planning and Development

This report is public

Purpose of report

To formalise an Enforcement Policy for Building Control.

1.0 Recommendations

The meeting is recommended:

- 1.1 to endorse the proposed building control enforcement policy (Appendix 1).

2.0 Introduction

- 2.1 The Building Safety Act 2022, which will come mainly into force on 1 April 2024, is set to fundamentally change how Building Control is administered and undertaken. The Act addresses in full the recommendations of Dame Judith Hackitt's inquiry and report into the reasons for the Grenfell Tower fire in 2017. There will be equally far-reaching implications for public and private sector Regulators alike.
- 2.2 The industry has been told that all Building Control Bodies (BCBs) should expect OFSTED-style inspections from time to time and one area of focus will be enforcement. As a BCB the Council already has the power to enforce where there are non-compliances with Building Regulations that are not being remedied. In practice, such circumstances are nearly always resolved through discussion and the need for formal enforcement action is avoided. Nevertheless, it would assist if we formalise current practice so there are clear expectations for the building industry and those affected by building work.
- 2.3 Secondary legislation is expected to supplement the Building Safety Act which, in time, is likely to require us to review our Policy. If so, a further report will be brought to the Executive. In the meantime, it is important we have a clear and unambiguous policy which both the public and any future Inspector of the Building Control Service will be able to understand.

3.0 Report Details

- 3.1 The Building Safety Act received Royal Assent in April 2022 and its detail is now emerging. It will significantly alter the way in which national Building Control is carried out and will affect private and public sector Building Control Bodies (BCBs) equally. BCBs are the organisations that are responsible for ensuring that developments are compliant with the Building Regulations.
- 3.2 Cherwell does not currently have a formally endorsed Building Control Enforcement Policy which the Building Safety Act will require. However, we do have established practice and process which align very closely with what is currently set out in the guidelines of LABC, our umbrella organisation.
- 3.3 Appendix 1 presents a proposed policy to formalise our current approach (note: Planning has a separate, adopted Local Enforcement Plan). The Council's joint CDC/SNC corporate enforcement policy (2016) will also need revisiting in due course –(<https://www.southnorthants.gov.uk/enforcement-policy>). In doing so, Planning and Development Officers will liaise with other teams involved in enforcement activities to assist coordination.
- 3.4 A much stronger degree of enforcement is expected from changes that will arise from the Building Safety Act's secondary legislation. When these are known a further report to the Executive will set the policy and budgetary implications. A more proactive approach to enforcement is likely to be required. At present, most BCBs enforce only against the most serious breaches - those that pose a high risk to life safety and personal injury. The messages coming from the Building Safety Regulator indicate that the threshold at which action is taken could be considerably lowered. Additionally, the tight time constraints in force through the current legislation are to be considerably relaxed enabling BCBs to act against long-standing breaches which is not currently possible.
- 3.5 The Building Safety Regulator (BSR), which is part of the Health and Safety Executive (HSE), has been set up by Government to oversee the performance of all BCBs. Its powers are very wide ranging. It will carry out OFSTED-style service inspections throughout the sector. Its powers include potentially placing poorly performing BCBs into special measures and in the last resort suspending or closing down their operations.
- 3.6 The BSR has stated it will carry out its inspection according to a risk-based approach. Cherwell's Building Control Service has 'ISO: 9001' accreditation and no buildings that currently fall into the Building Safety Act's high-risk category. ISO accreditation is achieved through an external audit of our management and operational processes which have been deemed fit for purpose. Regular internal audits are used to review processes and cases of non-conformance can be resolved prior to external audit. Nevertheless, preparation for the new inspection regime is important.
- 3.7 Dame Judith Hackitt in her Review of the Grenfell Tower fire was particularly critical of the reluctance of Local Authorities to enforce against breaches of the Building Regulations. This has led to stronger legislation. There can be little doubt that A BCB's Enforcement Policy and its enforcement record will carry significant weight at a BCB inspection.

- 3.8 Recognising that Cherwell currently has no official Building Control Enforcement Policy and that one may soon be mandated, there is a need to take positive steps. The adoption of current practice as policy would be an appropriate, proactive first step notwithstanding the current uncertainty about future secondary legislation and the potential to review wider, corporate enforcement policy.

Legal Context

- 3.9 The Council's Building Control enforcement powers lie under section 35 (as now supplemented by section 35A) and section 36 of the Building Act 1984.
- 3.10 Under sections 35 and 35A we have powers to bring proceedings for prosecution against non-compliant work through the Magistrates Court. Under section 36 we can serve notices to have non-compliant work taken down or corrected. However, our powers are currently time-limited:
- Under sections 35 and 35A, we have two years from the day a breach was committed, to be able to implement proceedings. However, where the Council has sufficient evidence to commence proceedings, action must be taken within 6 months (and before the expiry of the two year period). A successful prosecution can only result in fines against those in breach, and not the correction of non-compliant work.
 - Under section 36, to one year after the completion of the works that are in breach. A failure to make an application for notifiable work is itself a breach. A successful Notice would result in the correction of non-compliant work.
- 3.11 Through secondary legislation, not yet published, it is anticipated these time restrictions will be removed altogether or significantly extended. The BSR will then expect Local Authorities to pursue many more breaches with much more vigour. It is not yet known whether the time extensions will apply to breaches where the existing time limits have already expired.
- 3.12 Private sector BCBs are not empowered to take enforcement action. However, they will be expected to pursue breaches with equal vigour and their recourse will be to refer or "revert" cases to the Local Authority. We may therefore expect many more enforcement cases to come not only from applications made to us but also from those made to Approved Inspectors.

Our Current Process and Practice

- 3.13 The costs of enforcement of enforcement are wholly irrecoverable which is one of the main reasons why all Local Authorities currently use their powers very sparingly. We are in a competitive commercial environment and our Building Control income can only cover our work in administering the applications we receive. There is no headroom for enforcement coverage and we cannot afford to raise our fees. Enforcement costs cannot therefore be subsidised by the income we receive from applications and must therefore be borne by Councils' own revenue budgets.
- 3.14 Cherwell's current approach to enforcement is consistent with that of the vast majority of Local Authorities nationally.
- 3.15 Non-compliances with the Building Regulations can occur in two ways. Firstly, the work is the subject of an application but during its course does not proceed

compliantly as approved. Secondly, notifiable work proceeds without an application, which is itself a non-compliance, and then proceeds non-compliantly.

- 3.16 In the first instance in the vast majority of cases surveyors will successfully negotiate the rectification of the non-compliances with the applicant.
- 3.17 We are implementing a procedure whereby when we have had no contact about an application for 90 days we will contact the applicant to request a visit or a progress report. This should materially reduce the number of cases where a development proceeds non-compliantly without our knowledge but under an application.
- 3.18 Under the legislation (s.32 Building Act 1984) an application becomes invalid if work has not started on the project within 3 years of the application. Where an application has been lodged and there has been no subsequent contact we write to the applicant formally cancelling the application. This also flushes out cases where work has started and we have not been informed.
- 3.19 The second instances generally come to light when a property is being sold and the purchaser's solicitor requests sight of a Completion Certificate which does not exist. Where there is a good prospect that the work can be deemed compliant or easily made to be so we will invite a Regularisation application (in effect a retrospective application). We will then work closely with the applicant so that we can issue our Completion Certificate and everyone is satisfied.
- 3.20 However, there are instances when the work cannot be made compliant and we cannot take action because of the time limitations listed above. In those circumstances we cannot do anything except advise the property owner what should be done. Sometimes there is no practical prospect of compliance even when life safety issues, such as fire management, emerge. We have no powers currently to ensure such matters are resolved.
- 3.21 When we take enforcement action it is always open to challenge. We have to take a proportionate approach in all cases and we always regard legal enforcement as the last resort. Where there are life safety breaches that cannot be resolved by negotiation and we can enforce, we always will.

Recommended Policy

- 3.22 Appendix 1 presents a draft policy which might be finalised and adopted to formalise current practice.

4.0 Conclusion and Reasons for Recommendations

- 4.1 The need to formalise our enforcement process and practices has been brought sharply into focus by the emergence of the Building Safety Act 2022. To have a Policy will not only help the public but also our officers who come across breaches or have to respond to requests that enforcement is taken. Additionally, having a formal policy is very likely to become a requirement of the Building Safety Regulator.

5.0 Consultation

- 5.1 Councillor Dan Sames – Portfolio Holder for Planning & Development.

6.0 Alternative Options and Reasons for Rejection

- 6.1 The following alternative options have been identified and rejected for the reasons as set out below.

Option 1: To continue without a formal policy. This would undoubtedly attract criticism from the Building Safety Regulator. It is also not equitable that the public continues to have no reference to the circumstances under which enforcement will be triggered.

7.0 Implications

Financial and Resource Implications

- 7.1 There are no financial or budgetary implications as a result of this Report as it is not expected that the formalising of current process and practice would lead to more enforcement work. However, once the details of a new national enforcement regime is known, a review of resource needs will need to be undertaken having regard to any cross-Council support and efficiencies on enforcement activities.

Comments checked by:
Kelly Wheeler, Business Partner - Finance
Kelly.Wheeler@cherwell-dc.gov.uk

Legal Implications

- 7.2 There are no legal implications arising from this Report. The proposed policy seeks to formalise current process and practice in the interest of ensuring compliance with the Building Regulations.

Comments checked by:
Patricia Bramwell, Planning Solicitor
Patricia.Bramwell@cherwell-dc.gov.uk

Risk Implications

- 7.3 There is a risk that by not having a formally endorsed policy we could be successfully challenged if using our powers. Conversely, having a formal policy might increase public expectation that we will use our enforcement powers more widely. However, the over-riding factor is that it is likely that the BSR will expect us to have a formally endorsed Enforcement Policy and without one we could be heavily marked down when we are inspected. These, and any further arising risks, will be managed within the service area and escalated to the Leadership Risk Register as and when deemed appropriate.

Comments checked by:
Celia Prado-Teeling, Performance and Insight Team Leader

Celia.Prado-Teeling@Cherwell-dc.gov.uk

Equalities and Inclusion Implications

- 7.4 There are no implications for equalities and inclusion. We treat all our stakeholders in the same fair and proportionate manner and will continue to do so. Our proportionate approach necessarily has regard to parallel legislation, particularly the Equality Act 2010 and is aligned with our Equalities, Diversity and Inclusion Framework.

Comments checked by:

Celia Prado-Teeling, Performance and Insight Team Leader

Celia.Prado-Teeling@Cherwell-dc.gov.uk

Sustainability Implications

- 7.5 One of the drivers behind the Building Regulations is the provision and promotion of safer and more sustainable homes and workplaces. A formally endorsed policy would place greater weight behind that.

Comments checked by:

Jo Miskin, Climate Action Manager

Jo.miskin@cherwell-dc.gov.uk

8.0 Decision Information

Key Decision

Financial Threshold Met: No

Community Impact Threshold Met: No

Wards Affected

All Wards

Links to Corporate Plan and Policy Framework

Business Plan Priorities 2023-2024:

- Housing that meets your needs
- Supporting environmental sustainability
- An enterprising economy with strong and vibrant local centres
- Healthy, resilient and engaged communities

Lead Councillor

Councillor Dan Sames, Portfolio Holder for Planning and Development

Document Information

Appendix Number and Title

- Appendix 1 – Proposed Cherwell Building Control Enforcement Policy

Background papers

None

Report Author and contact details

Tony Brummell, Building Control and Flood Risk Manager

01295 221909

tony.brummell@cherwell-dc.gov.uk